THE SOUTH CHINA SEA UNCLOS TRIBUNAL AWARD 2016: WHAT IT HAS CHANGED AND WHAT IT DOES MEAN TO INDONESIA

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Abstract

Since The Permanent Court of Arbitration issued its award on 12 July 2016 it have raised many controvertion. Almost all Submissions are decided in favour of the Philippines. The Award, as expected by many scholars, is not intended to solve the core dispute of the South China Sea 'what maritime features belong to whom', since the very nature of this kind of dispute is not under the Tribunal competence. The sovereignty over disputed features shall be left to the claimant States for the resolution. Nevertheless, the Tribunal Award has not only clarified the dispute but also partially solve the core dispute. The legal clarification is expected to contribute to future negotiations among the claimant States concerning the core (sovereignty) dispute. This Article attempts to identify and describe what has been changed by the Tribunal Rulings and what has been solved. The implication of the Ruling on Indonesia's legal interest is also briefly discuss.

***Keywords*:** south china sea, UNCLOS, tribunal.

I. INTRODUCTION

The South China Sea dispute is a complex and proliferated dispute. The dispute is mainly about, and rooted in, overlapping claim over maritime features (islands, rocks, reefs) in the South China Sea by six countries bordering the South China Sea[1] i.e. China (including Taiwan), Vietnam, Malaysia, Brunei and the Philippines. The dispute starts since WW II but it has been since 1960 that the respective claim of the claimant states have been known to each other. China claims all the Spratly Islands based on historical discovery and control. Taiwan mirrors China's claim with some modifications. Vietnam also claims all the Spratly Islands based on historical discovery and colonial French inheritance. The Philippines claims some islands based on proximity and discovery/

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[1] Many books and articles have been written about the dispute. The most popular and recent one is writen by Bill Hayton, South China Sea: the Struggle for Power in Asia, Yale University, 2014. Overview about this book has been written by Damos Dumoli Agusman, Kompas, 22 November 2015.

occupation but has abandoned its claim on the basis of 'Paris Treaty Box'. Malaysia claims some islands based on proximity.[2]

On 12 July 2016, Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Philippines and China (hereafter called "Tribunal') issued a landmark Award concerning the South China Sea dispute. The Case was launched on 22 January 2013 when the Philippines instituted arbitral proceedings under Article 287 and Annex VII UNCLOS. The case brought by the Philippines in respond to the incident in 2012 where Chinese official vessels prevented by use of force the Philippines fishermen from entering Scarborough Shoal.

The Case was defined in a cautious manner so that it only dealt with three inter-related matters in the form of 15 Submissions. First is about the legality under the UNCLOS 1982 of China's claims based on "historic rights" encompassed within its so-called "nine-dash line". Second, the maritime status under the Convention of certain maritime features claimed by both China and the Philippines, whether they are properly characterised as islands, rocks, low tide elevations, or submerged banks. Third, the activities of China by construction and fishing has interfered with the exercise of the Philippines' sovereign rights and freedoms and have harmed the marine environment.

From the outset China strongly has objected the Philippines legal move. On 19 February 2013, China has reiterated that it will neither accept nor participate in the proceedings, by arguing that the Arbitral Tribunal does not have jurisdiction over the case. On 7 December 2014, China issued the Position Paper for its legal defence.[3] In the Position Paper, China stated that in regard with the South China Sea, China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct (DOC)[4] on Parties in the South China Sea, to

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[2] For a clear description of the respective claim see, Beckman, the UN Condntion on the Law of the Sea and the Maritime Dispute in South China Sea, 107 Am. J. Int'l L. 142 2013.

[3] Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

[4] Declaration on the Conduct of Parties in the South China Sea (DOC), adopted on

settle their relevant disputes through negotiations. In China's view, by unilaterally initiating the arbitration, the Philippines has breached its obligation under international law. Further, China also argued that the case is about sovereignty and maritime delimitation for which China has made declaration under Article 298[5] of UNCLOS 1982 for the excluding this kind of dispute from compulsory dispute settlement. China to some extend also revealed, albeit in ambiguous manner, its legal position on the meaning of its controversial claim/historic rights on the basis of 9 dash line.

China's respond is unprecedented. China, which previously preferred to remain silent and ambiguous in term of its legal position toward the issue, has since then moved out from its silence and increasingly reveals not only its official position but also the legal foundation underlining its maritime claim. In the same time Chinese scholars come out with abundant legal argument in the language of international law which tried to clarify the claim.

The Tribunal has carefully examined the China's objections and held public hearing in the jurisdiction and admissibility phase. On 29 October 2015 the Tribunal issued the Award on this matter and decided that it has jurisdiction. According to the Tribunal, most of the Philippines submission are disputes concerning the interpretation and application of the Convention. They do not constitute a dispute concerning sovereignty over the feature, which would remain entirely unaffected by the Tribunal's determination, nor is this a dispute concerning sea boundary delimitation for which are covered by the exclusion from jurisdiction under Article 298 of the Convention. There are a number of Submission[6] that the Tribunal reserved its decision on the jurisdiction for consideration in conjunction with the merits.

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4 November 2002, by ASEAN member States and China at the 8th ASEAn Summit in Phnom Penh. The 2002 DOC contains provisions on the following: (1) peaceful resolution of the territorial and jurisdictional disputes; (2) self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability; (3) confidence-building measures; and (4) cooperative activities.

[5] Article 298 of UNCLOS 1982 provides Optional exceptions to applicability of section 2. The dispute concerning maritime delimitation may, upon declaration by the Party, be excepted from compulsory procedure.

[6] Submission 1 and 2 on historic rights claimed by China.

Further, the Tribunal confirmed on the basis of Article 9 Annex VII of the Convention that the non appearance of China before the Arbitral Tribunal shall not constitute a bar to the proceedings. Interestingly, despite the fact that China did not sit before the bench, the Tribunal has regarded whatever China's official statements outside the Court rooms as official responds that constituted rebuttal to the Philippines submisions. Thus these statements were fully considered by the Tribunal in its deliberation and decisions.

On 12 July 2016, the Tribunal issued its final Award. Almost all Submissions are decided in favour of the Philippines. The Award, as expected by many scholars, is not intended to solve the core dispute of the South China Sea i.e. 'what maritime features belong to whom', since the very nature of this kind of dispute is not under the Tribunal competence. The sovereignty over disputed features shall be left to the claimant States for the resolution.

Nevertheless, the Tribunal Award has not only clarified the dispute but also partially solve the core dispute. The legal clarification is expected to contribute to future negotiations among the claimant States concerning the core (sovereignty) dispute. This Article attempts to identify and describe what has been changed by the Tribunal Rulings and what has been solved. The implication of the Ruling on Indonesia's legal interest is also briefly discussed.

II. LEGAL CLARIFIED FACTS

A. THE CONTROVERSY OF SO-CALLED "HISTORIC RIGHTS" WITHIN 9 DASH LINE

The dispute becomes more exacerbated when China starts embracing in its legal argument the ambiguous concept of '9-dashed lines', through which China is aggressively asserting "indisputable sovereignty" to all the islands and waters enclosed by the lines. China's so-called "9-dash-line" (originally "11 dashes") first promulgated by Republic of China in 1947. No record has shown that the map has been officially known to pubic debated until 1990's. Nor did it become China's argument in supporting its claim during incident with Vietnam in 1974 or

during the UN Conference on the Law of the Sea. In 1993 during the Workshop on Managing Conflict in South China Sea held in Surabaya, the Chinese delegation distributed a map showing the 9 dash lines and since then the mysterious map becomes subject to controversial debate among scholars and commentators around the world.[7] Amidst its controversy, China for the first time officially attached this map in its note to the Commission on the Limits of Continental Shelf in 2009, protesting the join submission of Malaysia and Vietnam about their extended continental shelf to the Commission. In 2012 China issue its passports showing the illustrative map.

The Tribunal held public hearing on the merits of the case from 23-30 November 2015 and dealt with the controversial question concerning the legality of China's claim concerning historic rights within the China's 9 dash lines. At the first observation by many, it was suggested that the Tribunal might have difficulty in determining its legality in the absence of China's clarification since China did not appear before the Tribunal. However, beyond public expectation, the Tribunal is so determined that it has competence to deal with the question i.e. whether or not there exists other maritime claims beyond UNCLOS 1982.

Before giving the answer to this question, the Tribunal has already indicated its understanding that in one hand China claims historic rights to the living and non-living resources in the waters of the South China Sea within the 'nine-dash line', but on the other hand China does not consider that those waters form part of its territorial sea or internal waters (other than the territorial sea generated by islands). According to the Tribunal, such a claim would not be incompatible with the Convention insofar as the areas are within China's exclusive economic zone and continental shelf. However, to the extent that China's claim to historic rights extends to areas that would be considered to form part of the entitlement of the Philippines to an exclusive economic zone or continental shelf, it would be at least at variance with the Convention.[8]

The Tribunal further declared that by acceding to the Convention and its entry into force, any historic rights that China may have had to the living and non-living resources within the 'nine-dash line' were su-

[7] As explained by Prof Hasjim Djalal to the Author, 2015.
[8] Para 232 of the Award

perseded, as a matter of law and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention.[9] The rule is without exception and has been known to all Parties since the Convention was a package that did not, and could not, fully reflect any State's prior understanding of its maritime rights. Accession to the Convention reflects a commitment to bring incompatible claims into alignment with its provisions, and its continued operation necessarily calls for compromise by those States with prior claims in excess of the Convention's limits.

The Tribunal made an interesting finding with regard to what it understood about China's historic rights. In the Tribunal's view, what China claimed as historic rights was nothing but the freedom of the high seas that it had. Under the previous regime, nearly all of the South China Sea formed part of the high seas. The international community has then determined to convert the highs seas to the EEZ where China gained a greater degree of control. Only China's freedom to navigate the South China Sea remains unaffected. What China enjoyed, as it has claimed, such as navigation and trade in the South China Sea, as well as fishing beyond the territorial sea, represented the exercise of high seas freedoms. China engaged in activities that were permitted to all States by international law, as did the Philippines and other littoral States surrounding the South China Sea.

From this perspective, the Tribunal is of the view that China's ratification of the Convention did not actually extinguish historic rights in the waters of the South China Sea. Rather, China relinquished the freedoms of the high seas that it had previously had. In this regard, the Tribunal tried to reformulate historic rights as understood by China in a more accurate context.

In its dispositif paragraph the Tribunal declares that, as between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention; and further declares that

[9] Para 262 of the Award.

the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein.[10] By this legal determination the so-called 'historic rights" as claimed by China has no basis under the Convention.

B. MARITIME STATUS OF DISPUTED FEATURES

Second, the Tribunal proceeded to determine whether the maritime features questioned by the Philippines are islands, rocks, reefs or just low tide elevation. The determination of their maritime status will clarify the respective claim, especially whether or not they may generate 12 Nm territorial sea (rocks) or in addition to it 200 Nm EEZ/continental shelf (islands), or otherwise they are not at al entitled to maritime zones (low tide elevation)[11].

Before determining this characterization, the Tribunal interpreted the Convention with a view of seeking a guiding principle. The Tribunal considers that the Convention requires that the status of a feature be ascertained on the basis of its earlier, natural condition, prior to the onset of significant human modification. The Tribunal will therefore reach its decision on the basis of the best available evidence of the previous status of what are now heavily modified coral reefs.[12]

The first exercise is then making distinction between low tide elevation and high tide elevation. The latter will constitute rocks or islands. In dealing with this characterization, the Tribunal was encountered with a technical determination of whether a particular feature is or is not above water at high tide. The two situation will determine which were low tide elevation and which are not. The most accurate determination, according to the Tribunal, would be based on a combination of methods, including potentially direct, in-person observation covering an extended period of time across a range of weather and tidal conditions. Such direct observation, however, will often be impractical for remote features or, as in the present case, impossible where human modifica-

[10] Para 1203 (B) (2) of the Award.

[11] It has been held by various international decisions that low tide elevations are not subject to title over islands and shall be regarded as parts of the maritime zone. The ownership will depend on who own the maritime zones that covering the elevations.

[12] Para 306 of the Award.

tions have obscured the original status of a feature or where political considerations restrict in-person observation. The Tribunal considers it important that the absence of full information not be permitted to bar the conclusions that reasonably can be drawn on the basis of other evidence. At the same time, the limitations inherent in other forms of evidence must be acknowledged.[13]

Having distinguished the low tide elevation from the high tide, the Tribunal proceeded to the second exercise i.e. making distinction between rocks and islands by interpreting Article 121 of the Convention concerning regime of islands.[14] The critical element of Article 121 for the Tribunal is its paragraph (3), which provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

In this regard, the Tribunal did not rely on the name given to them. A feature may have "Island" or "Rock" in its name and nevertheless be entirely submerged. Conversely a feature with "Reef" or "Shoal" in its name may have protrusions that remain exposed at high tide. Likewise, the fact that feature is currently not inhabited does not prove that it is uninhabitable. The fact that it has no economic life does not prove that it cannot sustain an economic life.[15]

In interpreting Article 121(3), the Tribunal drew the following propositions:[16]

1. First, the use of the term "rock" does not require that a feature be composed of rock in the geologic sense in order to fall within the

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[13] Para 321 of the Award.

[14] Article 121 of the UNCLOS 1982

Regime of islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

[15] Para 483 of the Award.

[16] Para 504 of the Award.

scope of the provision.

2. Second, the use of the term "cannot" makes clear that the provision concerns the objective capacity of the feature to sustain human habitation or economic life. Actual habitation or economic activity at any particular point in time is not relevant, except to the extent that it indicates the capacity of the feature.
3. Third, the use of the term "sustain" indicates both time and qualitative elements. Habitation and economic life must be able to extend over a certain duration and occur to an adequate standard.
4. Fourth, the logical interpretation of the use of the term "or" discussed above indicates that a feature that is able to sustain either human habitation or an economic life of its own will be entitled to an exclusive economic zone and continental shelf.

Using the above mentioned guiding principle and criteria, the Tribunal then examined the maritime feature under consideration and made a legal determination. The most important determination is that none of the features met criteria as 'islands' and thus none of them is entitled to exclusive economic zone or continental shelf. =

In a more specific determination, the Tribunal declares that some features, despite they are naturally formed areas of land, surrounded by water, which are above water at high tide, but they are in their natural conditions are rocks that cannot sustain human habitation or economic life of their own, within the meaning of Article 121(3). These are Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef. They are entitled to 12 Nm territorial sea.

Some others are low-tide elevation within the meaning of Article 13 of the Convention. These are Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef, and Second Thomas Shoal. Generally they do not generate entitlements to a territorial sea, exclusive economic zone, or continental shelf and are not features that are capable of appropriation. As for Subi Reef, Gaven Reef (South), Hughes Reef, they may be used as the baseline for measuring the breadth of the territorial sea because they lie within 12 Nm of high tide features of, respectively, Sandy Cay, Gaven Reef (North) and Namyit Island, McKennan Reef and Sin Cowe Island.

With respect to Scarborough Shoal, the Tribunal made additional characterization to this feature by declaring that it has been a traditional fishing ground for fishermen of many nationalities. With this newly-confirmed status, the Tribunal thus determined that China has, through the operation of its official vessels at Scarborough Shoal from May 2012 onwards, unlawfully prevented fishermen from the Philippines from engaging in traditional fishing at Scarborough Shoal.

C. ACTIVITIES OF CHINA IN RECLAIMED FEATURES

The third cluster of disputes is concerning the activities of China. The Tribunal dealt with question whether or not by construction and fishing in the specific disputed areas China has interfered with the exercise of the Philippines' sovereign rights and freedoms and have harmed the marine environment.

The question is mainly about he protection and preservation of the marine environment in the South China Sea as envisaged by the UNCLOS 1982. In this regard the Tribunal declares that China has breached its obligations under Articles 123, 192, 194(1), 194(5), 197, and 206 of the Convention.

III. WHAT THE TRIBUNAL RULING HAS CHANGED

Notwithstanding the juridical fact that the Tribunal Award does not, and is not intended to, solve the core dispute concerning title to maritime features, the Award has changed significantly the nature of respective claim of the claimant States over the features as well as waters in South China Sea. Although the Award, under Art 11 Annex VII UNCLOS, shall be complied with by the parties to the dispute only, the Tribunal interpretation of certain UNCLOS provisions has clarified their meaning and thus removed the controversy that so far attached to the dispute amongst other claimant States.

The first significant change is the removal of legal ambiguity underlining the overlapping claims. Not only claimant States but also all coastal States in the regions which had suffered from the dispute have been freed from the ambiguity of the so-called "9 dash line". Prior to

the Award, there was no legal explanation concerning the meaning of the line since China's approach to this controversial 'historic rights' was to keep it ambiguous. The prominent Chinese legal scholars made it clear that as no delimitation of maritime boundaries would be possible without settling sovereignty disputes over islands and reefs in question, thus maintaining ambiguity on the maritime claims might be the best choice for the moment. They further stated that any attempt to clarify the dash line would only lead to an escalation.[17] This might be the main reason why China was so reluctant to explain the legal nature of the claim albeit being frequently sought by many States. On the other hand, Chinese scholars might have different views thus discouraging the Government to issue the legal position.

This ambiguity had exacerbated the complexity of the already-complicated dispute. The real picture of the dispute in South China Sea had been mainly shadowed by this mysterious line and to some extent it had posed stagnancy and thus barred any effort for the resolution of the dispute. The situation became worst since China was not merely drawing the line in the map but recently also articulating and even enforcing the line on the ground (waters). These moves have created tension and given rise to a security dilemma[18] in the region by which all claimant States try to assert and consolidate their respective claims with a view of diminishing other claimant claims. Occupying and reclaiming the features are considered by them as the best mode for consolidating their title, notwithstanding that most legal scholars will argue that this mode will never work for acquisition of territories.

The Tribunal Award removed the line from the map and therefore the geographical scope of the claim becomes clearer. In this regard, the line shall no longer serve as a legal basis not only for claiming the

[17] Fu YingWu Shicun, 'South China Sea: How We Got to This Stage', The National Interest, 9 May 2016, can accessed at http://nationalinterest.org/feature/south-china-sea-how-we-got-stage-16118?page=show

[18] Jervis, R. "Cooperation under the Security Dilemma," World Politics vol. 30, no.2 (January 1978), pp. 167–174; and Jervis, R. Perception and Misperception in International Politics(Princeton, N.J.: Princeton University Press, 1978), pp. 58–113. See also Agusman and Nugroho, 'SCS Dispute: Security Dilemma Revival?", Jakarta Post 7 March 2016, can be accessed at http://www.thejakartapost.com/news/2016/03/07/scs-dispute-security-dilemma-revival.html

waters surrounded but also for claiming the title over the features being disputed. The removal of the line from the picture does not necessary mean that China has totally lost ground for claiming the features. It does only mean that China shall seek other more legitimate basis for claiming the features within the ambit of modes of acquisitions of territory recognized under international law. With other claimant States, China shall reformulate the claim and adjust it to the prevailing international law taking into account those prohibited rules as interpreted by the Tribunal.

As explained above, the Tribunal is not designed, and is not authorized by the Convention, to solve the sovereignty issues i.e. title to maritime features in South China Sea. The resolution of this very dispute is left to the claimant States to decide. Thus, while the Award does not touch the title over the features i.e. 'which features belong to whom', it is the responsibility of claimant States to solve the dispute through peaceful means. The Tribunal Award only paves a way for further solution. The claimant States shall further proceed to negotiate in a view of finding solution. They are free to choose the mode of dispute settlement either through direct negotiations or through third party settlement including judicial settlement through international courts.

In International Law, territorial dispute or title to 'islands' is considered as one of the most complicated case. The history has recorded that this kind of dispute is hardly solved through negotiations between the claimant States, because the absolutist positions and sovereign pride over their claimed territories would normally close the room for the abandonment of the claim. In the negotiation, the claimant states normally will encounter with the win-loose dilemma, which are irreconcilable.[19] It clearly explains why in practice the dispute over title to territories is increasingly, albeit with reluctantly, settled through a third party settlement mechanism or otherwise to keep the dispute unresolved.[20]

Southeast Asian countries have a better experience in settling dis-

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[19] Damos Dumoli Agusman, "Conflict Prevention and the Rule of Law: Reassessing the South China Sea Conundrum in the 21st Century – Progress and Prospect," presented at the 4th MIMA South China Sea Conference 2015, Kuala Lumpur, 8-9 August 2015.

[20] Id.

putes over title to territory, whether through negotiations or through a third party settlement. Thailand and Cambodia settled their land title dispute over the Temple of *Preah Vihear* (ICJ/1962)[21], Indonesia and Malaysia over *Sipadan and Ligitan* Islands (ICJ/2002)[22], Malaysia and Singapore over *Pedra Branca* (ICJ/2008)[23], and also the case by their predecessors between the Netherlands and the USA over the Island of *Palmas/Miangas* (Arbitration/1928).[24] On the other hand, on the North-east Asian scope, there is no record of dispute over territory is settled through third party and yet there is a number of title disputes left unresolved.[25]

The second significant change is concerning the geographical maritime scope of the respective claims. As the Tribunal confirms that none of the disputed features is entitled to EEZ/continental shelf, the status of waters becomes clearer. Before the Award, no legal determination whether the features they claim might generate maritime zone up to 200 Nm. They tended to regard the features they claim as fully entitled islands and thus attaching to their claim the assumption, as a default, that the features had their own EEZ/continental shelf.

Since there is no feature under consideration entitled to EEZ/continental shelf, EEZ or continental shelf in South China Sea is only derived and drawn from the mainland of the respective claimant States. The configuration of the maritime zones has changed significantly and given space to high seas in between opposite claimant States. Claimant States which adjacent one to another shall delimit their territorial

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[21] Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Jugdment of 15 June 1962, available at: http://www.icj-cij.org/docket/index.php?sum=284&p1=3&p2=3&case=45&p3=5.

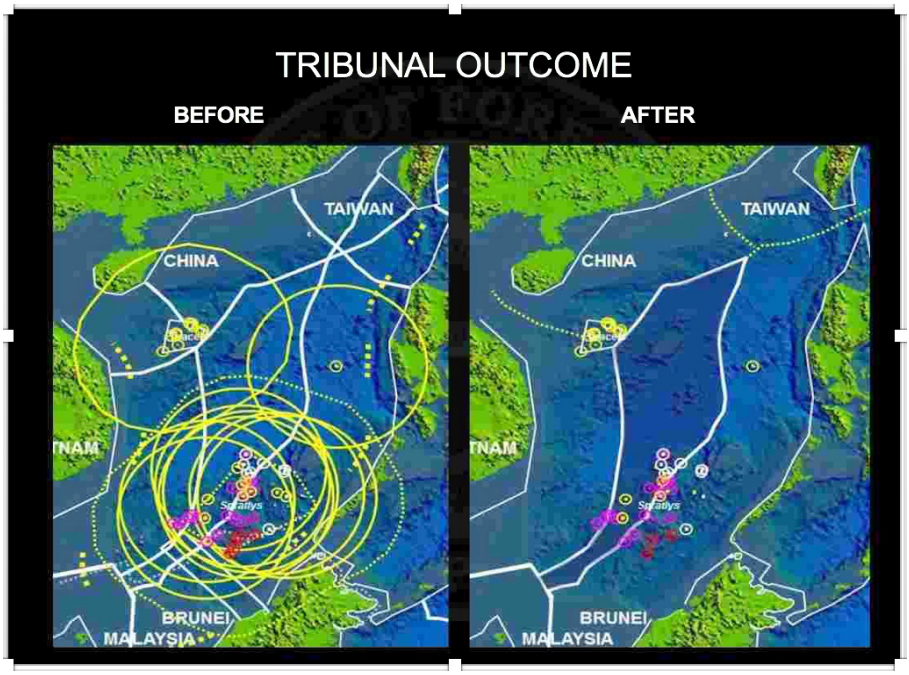
[22] Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), available at: http://www.icj-cij.org/docket/files/102/10570.pdf.

[23] Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore), available at: http://www.icj-cij.org/docket/files/130/14492.pdf.

[24] Reports of International Arbitral Awards, Island of Palmas case (Netherlands v. USA), 4 April 1928, Volume II pp. 829-871, available at: http://legal.un.org/riaa/cases/vol_II/829-871.pdf.

[25] For instance: the Liancourt/Dokdo between Japan and South Korea; Senkaku/Diaoyudau Island between Japan and China, and the dispute concerning maritime features in South China Sea.

sea and EEZ/continental shelf and to be effected through agreements. Some features, with the 12 Nm territorial sea, will scatter and lie within the EEZ/continental shelf drawn from the main coast and some of them within the high seas.



Courtesy of Mr Bensurto

The third significant change, and arguably is the most delicate one, is that the core dispute has been partially solved. The Tribunal finds that Mischief Reef and Second Thomas Shoal are low-tide elevations not capable of appropriation, and they are within the exclusive economic zone and continental shelf of the Philippines. By this ruling, the two features are not subject to be disputed since they form part of the maritime zone and they lie uncontested within the Philippines EEZ/ Continental Shelf. In this regard, the maritime status of the two features is hereby determined as belong to the Philippines and shall be taken out from the 'disputed box'.

IV. IMPLICATION OF THE TRIBUNAL AWARD ON INDONESIA

It has been a long standing position that Indonesia is not part of the dispute[26]. Indonesia is not claimant States in the South China Sea dispute, simply because Indonesia does not claim any feature in the area and no state claims any feature within Indonesia's South China Waters waters.[27]

Some doubts had been raised in 1990's whether or not China claimed the Natunal island following the disclosure of China's 9 dash lines in 1993. The doubt has been removed since Foreign Minister Qian Qichen in 1995, in respond to Foreign Minister Ali Alatas question, clarified that China has no claim over Natuna islands.[28] Similar confirmation has also been acquired by Foreign Minister Retno Marsudi from Foreign Minister Wang Yi in their informal meeting on 3 June 2016 in Paris.

The complexity of the dispute to some extent has confused Indonesian pubic about the position of Indonesia *vis a vis* the dispute. The position of Indonesia has thus been understood differently and diversely amongst Indonesian public. The 9-dashed-line, one of which encroached the waters in the vicinity of Indonesia's *Natuna Islands,* had (mis) led some officials to assert that there was an overlapping claim between Indonesia and China.[29] Actually there is no geographical datum attaching to the 9 dash line so no one could be sure where exactly the lines are located. Apparently, some have argued that it encroached part of Natuna waters and came to a conclusion that, as if, Indonesia had dispute with China over maritime in the waters. This fact has lent to a convincing reason that Indonesia is a claimant state.

[26] The position has been recently reiterated by President Jokowi during the ASEAN Summit in Kuala Lumpur, 22 November 2015.

[27] Natuna Archipelago is within Indonesia's waters but geographically also a part of South China Sea.

[28] Official correspondence is on file with the author.

[29] The debate was on the for following a public statement by Mr. Fahru Zaini, Senior Official of the Coordinating Ministery for Political, Legal, and Security Affairs (Menkopolhukam): "China has claimed Natuna waters as their territorial waters. This arbitrary claim is related to the dispute over Spratly and Paracel Islands between China and the Philippines. This dispute will have a large impact on the security of Natuna waters", see Evan Laksmana, "Why there is no 'new maritime dispute' between Indonesia and China," the Strategist, 4 April 2014, available at: http://www.aspistrategist.org.au/why-there-is-no-new-maritime-dispute-between-indonesia-and-china/.

Claiming that Indonesia is a claimant state simply on the ground that it has overlapping maritime claim with China, if any, in the South China Sea is not very convincing for the following reasons. First, the notion 'claimant states' mostly refers to overlapping claim over title to islands, not to overlapping claim to maritime zones. Indonesia has overlapping maritime zones in entire bordering areas with all its neighbours and hardly been referred to as 'claimant state'. Indonesia was a claimant State when it had dispute since 1969 with Malaysia over Sipadan and Ligitan Islands, which had been then solved by ICJ in 2002 in favour of Malaysia.

Second, whether Indonesia has overlapping claim with China could not be determined simply and merely by the fact that there exists one of the dash line within Indonesia's waters. In this regard, Indonesia has persistently protested the lines including President Joko Widodo who recently stated that Chinese 9 dash line has no legal basis.[30] Likewise, many States have make similar protest to the China's 9 -dash line-map. In this circumstance, considering that the map has violated UNCLOS 1982, the problem arising from the line should not be regarded as either between claimant states or between bilateral contexts only, but it should be the problem of all parties to UNCOS 1982.

In order to constitute that there is an overlapping claim, China should have a good basis for making a proper claim that legitimately opposes to Indonesia's claim over the maritime zone. On the part of Indonesia, it has under UNCLOS 1982 a legitimate claim over 200 Nm of EEZ/continental measured from its baselines. On the part of China, it is hardly tenable to assert its claim on the basis of 9 dash line since the line has no foundation in international law. In this circumstance, asserting that there is a dispute between Indonesia and China over the maritime zone is legally unfounded.

The ambiguity of the 9 dash line that appeared in Natuna waters had to some extent created uncomfortable situation between the two Countries. Although both Parties succeeded in managing the 'differ-

[30] See "Indonesia's President says China has no legal claim to South China Sea: Yomiuri," The Straits Times, 23 March 2015, available at: http://www.straitstimes.com/asia/se-asia/indonesias-president-jokowi-says-china-has-no-legal-claim-to-south-china-sea-yomiuri.

ences', and China's approach tends to shelve the issue undiscussed, the potential tension was not fading away. Indonesia persistently lodged its official protest to the China's 9 dash line map and kept asking about the meaning of the line.

Until recently, China had only put the line on its map and rarely executed the line on the ground. In 2013 China apparently started articulating its claim on the basis of its line in the part of Indonesia. Some incidents occurred in Natuna waters where Chinese fishing vessels were encountered by Indonesian legal enforcement. The incidents were then being managed discreetly without public exposure. Following the new approach pursued by President Joko Widodo since his office in 2014, particularly with his strongest measures against IUU fishing, the massive legal enforcement against illegal fishing by the new Administration has resulted three consecutive arrests of Chinese fishing vessels in Natuna waters (within the 9 dash line) in the period of March-June 2016 and created open and diplomatic tension between the two Countries.

The diplomatic interactions between the two Governments in handling the incident brought about a new argument to the 'historic rights'. Having being silent on the 'mysterious 9 dash line claim', it was for the first time China made an unprecedented open and public claim that it has "differences' (instead of 'dispute") with Indonesia in Natuna waters. China introduced a new claim in the old casing called "traditional fishing ground"[31]. Again the claim is stated unexplained by Chinese authority.

Fortunately, the incidents occurred in the time when the Tribunal was at its session. As explained above, the Tribunal Award has confirmed that the line as well as any so-called 'historic rights' outside the Convention is not valid. It declares that the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein. In a specific argument, the Tribunal has clearly expressed its view that no such historic rights extends to EEZ or continental shelf.[32] The ruling constitutes a sweeping formula for supersed-

[31] The notion "Traditional Fishing Ground" raised by China in Natuna warters is discussed by M. Taylor Fravel in "Traditional Fishing Grounds and China's Historic Rights Claims in the South China Sea", Maritime Awarnes Project, July 11, 2016

[32] Para 239 of the Award.

ing what China asserted as "traditional fishing ground" in Indonesia's Natuna EEZ.

The controversy arising from the line has since the Tribunal ruling apparently faded away from the public debate. The question then arises whether the Award may be invoked by Indonesia in order to prevent China from making any claim on the basis of the 9 dash line. In this regard, there is no doubt that the award shall be complied with by the parties to the dispute.[33] Indonesia is not the party to the dispute and as such is not entitled to invoke the Award. Traditional approach however suggests that the judicial decisions such as the Award of the Tribunal may enter into jurisprudence (case law) and thus could be invoked by States other than the Parties to the dispute. It this regard, the Award binds other States by virtue of jurisprudence (case law).

Nevertheless the Author would prefer to argue beyond this traditional approach and in favour of the view that Indonesia may invoke the Award directly.[34] The Tribunal in dealing with this particular case is not only making adjudication to the Parties, but also interpreting the provisions of UNCLOS 1982 particularly Article 55-75 concerning EEZ and Article 121 concerning the regime of islands. As a party to the UNCLOS 1982, Indonesia is bound by its provisions. Since the provisions have been interpreted by the Tribunal, Indonesia shall be bound by the provisions as interpreted by the Tribunal including the provisions that superseded historic rights/9 dash line. Arguing that the interpreted provisions only bind the parties to the dispute would be indefensible and could create legal chaotic. It would be unsound to argue that the 9 dash line is invalid in the Philippines waters by virtue of the Award but in the same time remains valid or undecided in the Natuna waters.

Therefore, the Award removes doubt concerning status of Indonesia as non claimant State. The Award confirmed that no overlapping claim may arise between Indonesia and China in Natuna waters. In this regard, even before the Tribunal issuing its Award, the Minister of Foreign Affairs Retno Marsudi of Indonesia has make it clear that in the Natuna

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[33] Article 11 Annex VII, UNCLOS 1982.

[34] Damos Dumoli Agusman, "International Norms and Rules: Lesson Learned from Indonesia", at the Second Manila Conference on the South China Sea", 3 – 4 August 2016.

waters Indonesia has overlapping maritime zone only with Vietnam and Malaysia, so to exclude China.[35] In Indonesia's view, the Award merely confirms its long established understanding concerning the line.

From the law of the sea perspective, there would be a potential maritime claim involving Indonesia in the South China Sea if there was island entitled to 200 maritime zone lie within less than 400 Nm from Indonesian outermost island i.e. Natuna island. One of the features under Tribunal consideration is Cuarteroon Reef, which is about 377 Nm from Natuna island. Fortunately, the Tribunal finds that the Reef is a rock which is not entitled to 200 Nm maritime zone and thus cannot overlap waters within Natuna maritime zone. The Tribunal has therefore removed the uncertainty arising from Cuarteroon Reef.

Another possible overlapping claim on the UNCLOS-friendly basis had also been raised by Chinese Scholar, Xue Manyi[36], who argued that the Vanguard Bank (claimed by China but occupied by Vietnam) which located in a distant of 185 Nm from Natuna may constitute overlapping maritime zone with Indonesia in Natuna waters. The argument came out in respond to the incident of 19 March 2016 when Indonesia's Coastguard arrested Chinese fishing vessel in Natuna waters in a distant of about 76 Nm from Vanguard Bank. This kind of argument has however been overruled by the Tribunal Award. The status of Vanguard Bank is not bigger than the features under Tribunal consideration and therefore it is hardly entitled to maritime zone

V. CONCLUSION

The Tribunal Award as summary explained above has been considered as an unprecedented landmark judicial decision that has changed significantly the configuration of dispute in South China Sea. Albeit not solving the real core dispute, the Award at least has successfully clarified the dispute, put the distinguishable elements in the proper setting, and presented the dispute in a clearer picture. Put it in Mr Bensurto's

[35] The Annual Press Statement of the Indonesia Minister for Foreign Affairs, 7 January 2016. It can be accessed at http://www.kemlu.go.id/en/pidato/menlu/Pages/The-Annual-Press-Statement-of-the-Indonesian-Minister-for-Foreign-Affairs-2016.aspx

[36] Xue Manyi, Phoenix Magazine, 22 March 2016.

words, the Award has successfully unlocked the gridlock[37] in South China Sea.

The Tribunal apparently did not only adjudicate the case before it but also exercise its authority under UNCLOS 1982 to interpret the provisions of the Convention relevant to the case. By doing so, the Tribunal has provided clarification to some provisions that until recently their meaning had been debated. The interpretation of the Tribunal of the Convention apparently becomes the most important aspect in this Award since the dispute is not merely concerning the interest of the parties to the dispute but also affects the interest of other claimant States as well as other interested States.

The Award has significantly changed the configuration of the dispute in South China Sea. First it removed the ambiguity of so called 'historic rights within 9 dash line' claimed by China by declaring that the line is not compatible with the UNCLOS 1982. Second, it clarified maritime features by providing sweeping ruling, on the basis of its interpretation of Article 121 UNCLOS 1982, that none of them is entitled to generate the maritime zone (EEZ/continental shelf) up to 200 Nm. The two distinguished but interrelated rulings have perfectly removed distorted claims and thus narrowed the geographical scope of the dispute.

It is also argued that in fact the Tribunal Award has partially solved the core (sovereignty) dispute. By declaring the Mischief Reef and Second Thomas Shoal (located within the Philippines EEZ) as low tide elevation, the ruling has ended the contention concerning title to these features. The two are not capable for appropriation and therefore taken out from the list of disputed features. On the other hand, the newly-determined status of these feature poses complexity about its enforcement on the ground. China has carried out reclamation and constructing airstrip in Mischief Reef. The remain presence of China in the Reef is as such constituting violation the Award and might create possible tension between the partied to the dispute.

Indonesia is not a claimant State to the dispute and has persistently opposed to any discourse that there exists overlapping maritime claim

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[37] Henry Bensurto, "15 Paths to Peace: Unlock the Gridlock in SCS", paper presented at the Second Manila Conference on the South China Sea", 3 – 4 August 2016.

with China. The Tribunal Award especially on its ruling that annulling the 9 dash line is therefore nothing but confirming this long standing position. On the other part, the Award has also removed possible doubt about whether or not there exists feature in nearby that might possibly overlap the Natuna waters. By finding that none of the features is eligible to generate EEZ/continental shelf, the Award confirms that none of them will possibly encroach the Natuna waters.

As Indonesia is bound by the provisions of the UNCLOS 1982, it is also automatically bound by the provisions as interpreted by the Tribunal. Thus Indonesia may capitalize the Award for its legal defence in dealing with Natuna waters. In this circumstance Indonesia is a "lucky beneficiary" of the Award.